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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 245

CHARLES W. GROGAN, et al.,
Petitioners,

v.

ANTHONY J. WACHTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Missouri.

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To the Supreme Court of Missouri.

Charles W. Grogan, Desmond Lane, Robert Capps, Patrick Neary, Robert Cochran, Edward M. Fisher and August Mehrhoff pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Missouri entered in the above-entitled cause on February 13, 1967.

OPINIONS BELOW.

The judgment of the Circuit Court of the City of St. Louis, State of Missouri, was entered on April 30, 1965, and is unreported (R. 423). The Opinion of the St. Louis Court of Appeals, included herein as Appendix A, is reported at 410 S. W. 2d 550.

JURISDICTION.

The Opinion of the St. Louis Court of Appeals was filed on November 15, 1966 (App. A, *infra*). Petitioners' motion for a rehearing or to transfer to the Missouri Supreme Court with supporting suggestions, timely filed, was denied by the St. Louis Court of Appeals on December 12, 1966. A timely application for transfer was filed with the Missouri Supreme Court on January 6, 1967. The application for transfer was denied by the Missouri Supreme Court on February 13, 1967. On April 17, 1967, Associate Justice Byron R. White granted an extension of time to file a petition for a writ of certiorari until June 13, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTION PRESENTED.

1. Does a state court lack jurisdiction over an action by a union member against his union for damages, including loss of employment, as the result of an alleged wrongful expulsion from union membership, where restoration of union membership is not an element of relief sought, because such an action is within the exclusive primary jurisdiction of the National Labor Relations Board?

STATUTE INVOLVED.

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, *et seq.*), are set forth in Appendix B, *infra*.

STATEMENT OF THE CASE.

A. The Parties.

Respondent is an individual member of Highway and City Freight Drivers, Dockmen and Helpers, Local Union

No. 600, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereafter referred to as "Local 600" or "the Union") (R. 185). He was the plaintiff in the action below (R. 2). Petitioners, the defendants below, were all members and officers of Local 600, and also members of its Executive Board. They were sued as individuals, as officers of the Union and as members of a class consisting of the entire membership of the Union (R. 3, 188).

In the interests of clarity the parties will hereafter be referred to as they were designated in the proceedings below.

B. The Discharge.

In May of 1955 plaintiff was steadily employed by C. E. S. Truck Lines, Inc., as a truck driver (R. 210). He was, at that time, an active member of the Union (R. 154). Prior to 1955 plaintiff had received at least seven warning letters from C. E. S. for various infractions of company rules and policies (R. 220-222). On August 8, 1955, he received still another warning letter from his employer because of improper handling of company property (R. 109-110, 211, 292). Plaintiff confronted Amos Govero, President of C. E. S. Truck Lines, with the warning letter and demanded that it be withdrawn. Govero refused and a heated dispute ensued. Mr. Govero objected to some of the statements made to him by plaintiff, and plaintiff was informed that he was discharged (R. 84-86, 90).

The following day Mr. Govero sent plaintiff a letter outlining, in general terms, the reasons for his discharge (R. 110-111, 212-213, 293). This discharge letter, however, was not sent by registered mail, which was the requisite procedure in discharge cases in accordance with the collective bargaining agreement in effect between the

company and the Union (R. 112-113, 213). When defendant Grogan was apprised of the circumstances, he, as President of Local 600 and on behalf of plaintiff, protested the discharge letter (R. 112-113, 213-215, 294-295, 373).

Subsequently, Mr. Govero sent a second discharge letter to plaintiff, this time by registered mail (R. 114, 215, 293-294, 373). On the following day, defendant Grogan, again acting as President of Local 600 and on behalf of plaintiff, requested that a grievance be processed with regard to plaintiff's discharge in accordance with the terms and provisions of the collective bargaining agreement (R. 114-115, 215-216, 296).

A grievance hearing to take testimony on the propriety of plaintiff's discharge was promptly scheduled and held before a panel consisting of three representatives of management and three representatives of labor (R. 158, 224-226, 309). Defendants Grogan and Lane sat as two members of that panel (R. 309, 342). Plaintiff was represented at the grievance hearing by defendant Capps, the business representative of Local 600 who ordinarily handled such matters for employees at C. E. S. Truck Lines (R. 301, 311, 342). After the hearing was concluded, the panel deliberated and reached the unanimous decision that plaintiff's discharge was for good cause and was not in violation of the collective bargaining agreement between the company and the Union. Accordingly, plaintiff's discharge was upheld and a written decision was issued (R. 41-42, 119-120, 316-318, 344).

C. Intra-Union Trials and Appeals.

1. Wachter v. Grogan.

Plaintiff was not satisfied with the decision of the panel in his grievance hearing (R. 40, 79). He felt a particular animosity toward the union members of the panel be-

cause he felt that his brother union members should have taken his word against the word of any company representative at the hearing, regardless of the credibility of the witnesses, the logic of the arguments, the persuasiveness of the testimony or anything else (R. 75-76, 227-231, 268-269). Motivated by his strong feelings in this regard, plaintiff filed charges within the Union against defendant Grogan alleging that Grogan had violated certain provisions of the Constitution of the International Brotherhood of Teamsters (R. 36-38, 161, 354-355). A hearing of plaintiff's charges was duly held before a trial panel consisting of seven members and officers of Local 600. All parties were afforded full opportunity to present evidence and to cross-examine witnesses (R. 35-97). Thereafter, the trial panel issued its unanimous written decision which fully exonerated defendant Grogan from all the charges brought against him by plaintiff. A copy of this decision was furnished to plaintiff (R. 140-141).

2. Grogan v. Wachter.

Defendant Grogan subsequently filed charges within the Union against plaintiff alleging certain violations of the Constitution of the International Brotherhood of Teamsters. Plaintiff received a copy of these charges by registered mail (R. 101-102). During the course of the hearing on these charges, as before, each of the parties was given the opportunity to present testimony and evidence and to cross-examine witnesses (R. 101-135). Thereafter, the trial panel issued a unanimous written decision and order finding plaintiff guilty of the charges preferred against him and ordering that he be permanently expelled from membership in Local 600 (R. 141-143, 236). Plaintiff received a copy of the trial panel's decision and order and was advised of his rights of appeal (R. 141-143, 169).

Plaintiff prosecuted his appeal from the trial panel's decision to Teamsters Joint Council No. 13 (R. 169). The

appeal was ultimately heard, and by a written decision the Joint Council upheld plaintiff's expulsion from membership in Local 600 (R. 169). Thereafter, plaintiff appealed to the Executive Board of the International Brotherhood of Teamsters (R. 170). The Executive Board of the International Brotherhood of Teamsters found itself in disagreement with the decisions of Local 600 and the Joint Council. Accordingly, by a written decision, it reversed the two prior decisions and ordered that plaintiff be reinstated as a member of the Union with all rights and privileges pertinent thereto (R. 237).[1] In accordance with the International Union's decision, plaintiff was granted all rights as a member of Local 600, and ever has been, and still is, a member of the Union in good standing (R. 237-238).

D. This Action.

Plaintiff instituted this suit in the Circuit Court of the City of St. Louis, Missouri. Defendants were sued as individuals, as officers of Local 600 and as representatives of a class consisting of the entire membership of Local 600 (R. 2, 3).

Plaintiff's petition alleges, in substance, that defendants wrongfully interfered with his employment by expelling him from membership in Local 600 on charges filed by defendant Grogan which had no reasonable basis and which were actuated by malice (Pet. pars. 13, 14, 28, 31, R. 7, 10, 11). The alleged right of recovery was predicated on the contention that in order to obtain employment in the trucking industry in the St. Louis area it is absolutely necessary that one be a member of

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[1] Article XVIII, Section 2, sub-section (b) of the Constitution of the International Brotherhood of Teamsters, provides, in pertinent part, as follows:

"• • • Pending any appeal, the decision appealed from shall remain in full force and effect" (R. 148).

the Union (Pet. pars. 10, 31, R. 6-7, 11). Plaintiff prayed for actual and punitive damages (R. 11-12).

In their answer defendants stated, among other things, that the Missouri courts did not have jurisdiction over the controversy because it is within the exclusive primary jurisdiction of the National Labor Relations Board (R. 25-29).

During the trial defendants attempted to prove that plaintiff had filed unfair labor practice charges against the Union and C. E. S. Truck Lines with the National Labor Relations Board in connection with his expulsion from union membership, alleging that the Union had violated Section 8 (b) (1) (A) and (2) of the National Labor Relations Act, as amended, 29 U. S. C. 158 (b) (1) (A) and (2), and that the company had violated Section 8 (a) (3) of that Act, 29 U. S. C. 158 (a) (3). Defendants also offered to prove that the National Labor Relations Board asserted its jurisdiction and made an administrative investigation of the facts. This offer of proof was excluded as being immaterial to the issues in the case (R. 251-253).

The jury found the issues in favor of the plaintiff and against the defendants, and assessed actual damages only in the amount of $12,700.00 (R. 410).

Defendants filed a timely after-trial motion (R. 411-422). On April 30, 1965, the trial court entered its Memorandum and Order setting aside the jury's verdict and the judgment thereon, and entered a judgment for defendants on the basis that the court has no jurisdiction over the subject matter of plaintiff's petition because it is within the exclusive primary jurisdiction of the National Labor Relations Board (R. 423). The St. Louis Court of Appeals reversed the trial court and found that plaintiff's cause of action was not within the exclusive primary jurisdiction of the National Labor Relations Board (App.

A, *infra*). A timely motion for rehearing or to transfer to the Missouri Supreme Court was denied by the St. Louis Court of Appeals, and a timely application for transfer was denied by the Missouri Supreme Court.[2]

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE MISSOURI SUPREME COURT HAS DECIDED A FEDERAL QUESTION OF GREAT NATIONAL SIGNIFICANCE IN A WAY WHICH IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT.

The St. Louis Court of Appeals held that the instant case does not fall within the exclusive primary jurisdiction of the National Labor Relations Board because it involves "an internal union matter" as defined by this Court in **International Association of Machinists v. Gonzales**, 356 U. S. 617 (1958) (See App. A, page 25). This holding is in direct conflict with the decisions of this Court in **Plumbers, Local 100 v. Borden**, 373 U. S. 690 (1963), and **Iron Workers, Local 207 v. Perko**, 373 U. S. 701 (1963), which placed an authoritative interpretation on the **Gonzales** case and limited the field of its application.

By enacting our federal labor laws Congress established a broad regulatory scheme to be applied uniformly throughout the length and breadth of the nation. This Court has recognized that uniformity of regulation in the labor relations field was of the utmost concern to the Congress. **Garner v. Teamsters, Local 776**, 346 U. S. 485, 490 (1953); **Guss v. Utah Labor Relations Board**, 353 U. S. 1, 10-11 (1957). With this consideration in mind the Court established the following principle in **San Diego Building Trades Council v. Garmon**, 359 U. S. 236, 244 (1959):

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[2] Certified copies of the motion for rehearing or transfer and the application for transfer, together with the Orders of the St. Louis Court of Appeals and the Missouri Supreme Court have been submitted to this Court as part of the record below.

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the Taft-Hartley Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. **Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed toward the governance of industrial relations.** Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." (Emphasis supplied.)

This principle has come to be known as the doctrine of federal preemption. It is important to note that the court need not make a definitive judgment on the question of whether the action before it involves employees' rights guaranteed by Section 7 or unfair labor practices prohibited by Section 8. It is sufficient to uphold preemption and deprive a state court of jurisdiction if the conduct complained of "arguably" comes within the ambit of these federal provisions. **San Diego Building Trades Council v. Garmon**, supra, at 245. Moreover, "even if it were clear that no unfair labor practices were involved, it would not necessarily follow that the State was free to [exercise its jurisdiction]. If this conduct does not fall within the prohibitions of § 8 of the Taft-Hartley Act, it may fall within the protection of § 7, as concerted activity for the purpose of mutual aid or protection." **Weber v. Anheuser-Busch, Inc.**, 348 U. S. 468, 478-479 (1955). Considering these principles, it is abundantly clear that the conduct complained of by plaintiff, if true, constitutes

unfair labor practices under federal law, or, at the very least, it is "arguable" that such is the case.

Section 8 (a) (3) of the National Labor Relations Act, as amended, 29 U. S. C. 158 (a) (3), reads, in pertinent part, as follows:

> "(a) It shall be an unfair labor practice for an employer—
>
> * * * * * * * *
>
> "(3) **by discrimination in regard to hire** or tenure of employment or any term or condition of employment **to encourage or discourage membership in any labor organization.**" (Emphasis supplied.)

Sections 8 (b) (1) (A) and (2) of the Act, 29 U. S. C. 158 (b) (1) (A) and (2), read as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> "(1) to restrain or coerce (A) employees in the exercise of rights guaranteed in section 7: **Provided,** That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;
>
> * * * * * * * *
>
> "(2) **to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership has been denied or terminated** on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." (Emphasis supplied.)

The crux of plaintiff's case is that defendants have wrongfully interfered with his employment by expelling him from union membership, and that employers have re-

fused to hire him because he was not a member of the union (Pet. pars. 10, 13, 14, 31; R. 6-7, 11, 173-175). If these allegations are true, the employers who refused employment to plaintiff because he was not a member of the Union violated Section 8 (a) (3) of the Act, 29 U. S. C. 158 (a) (3), and the Union by its alleged actions in encouraging employers to deny plaintiff employment because he was not a member of the Union violated Section 8 (b) (2) of the Act, 29 U. S. C. 158 (b) (2). This deprives the State courts of any jurisdiction over the controversy.

The St. Louis Court of Appeals held, however, that plaintiff's action involved "an internal union matter" which is not within the exclusive primary jurisdiction of the National Labor Relations Board (App. A, page 25). This is in direct conflict with the decisions of this Court. In its decision the St. Louis Court of Appeals relied principally upon **International Association of Machinists v. Gonzales**, supra. The error of this decision clearly appears from a consideration of this Court's interpretation of the **Gonzales** case in **Plumbers, Local 100 v. Borden**, supra, and **Iron Workers, Local 207 v. Perko**, supra.

Gonzales was a suit against a union by an employee who claimed that the union had expelled him from membership in violation of his contractual rights and who sought restoration of union membership. He also sought consequential damages flowing from the expulsion, including lost wages. The union admitted that the state court had jurisdiction to order restoration of union membership, but denied that the state court had jurisdiction to award consequential damages "to fill out" this remedy. As the Court recognized in **Plumbers, Local 100 v. Borden**, supra, at 697, the **Gonzales** decision turned on the conclusion that the suit was focused on purely internal union matters, that is on relations between the employee and the union not having to do directly with matters of employment, and

that the principal relief sought by the employee was restoration of union membership. In this posture, the Court held that the state court did not lack jurisdiction to grant collateral relief in the form of consequential damages for loss of employment.

Borden was a damage suit by a union member against his union in which it was alleged that the union had refused to refer him for employment and thereby interfered with the member's right to obtain gainful employment. In holding that the state court did not have jurisdiction to entertain the suit, this Court pointed out that the suit was focused principally, if not entirely, on the union's actions with respect to the member's efforts to obtain employment. "No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages." **Plumbers, Local 100 v. Borden**, supra, at 697. Following the same line of reasoning, this Court, in **Perko**, ruled that a state court was pre-empted of power to entertain a common law tort action for damages which was brought by a union member against his union in which it was alleged that the union interfered with the member's employment by causing his discharge and preventing him from obtaining substantially equivalent employment.

This case falls squarely within the decisions of the Court in **Borden** and **Perko**. The plaintiff is not seeking reinstatement to union membership; indeed, he has already been reinstated as a member of the union (R. 237-238). Thus, there is no permissible state remedy to "fill out" by allowing an award of consequential damages. Plaintiff's remedy, if any, was exclusively within the jurisdiction of the National Labor Relations Board.

This case presents a federal question of great importance. Plaintiff has attempted to bring a state court

action on a claim which is at least "arguably" protected or prohibited activity under our federal labor laws, and, therefore, within the exclusive primary jurisdiction of the National Labor Relations Board. The protection of the employment relationship is certainly one of the most important functions of that federal agency, and a fundamental concern of the statute which it administers. To allow the state courts to take cognizance of such an action would lead to disparity in labor policy and instability in labor relations. Furthermore, to allow the Missouri courts' decisions to stand in this case would create confusion in a sensitive area of national labor policy.

CONCLUSION.

For the reasons stated it is respectfully urged that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

In the St. Louis Court of Appeals.

September Session, 1966.

Anthony J. Wachter,
Plaintiff-Appellant,

v.

Charles W. Grogan et al.,
Defendants-Respondents.

No. 32,268.
Opinion Filed
November 15, 1966.

Plaintiff Anthony J. Wachter claimed that the defendant Union had maliciously expelled him. He sued the Union for actual and punitive damages, and the jury gave him a $12,700 verdict. On the Union's after-trial motion for judgment the trial court decided it did not have jurisdiction over the subject matter and entered judgment for the Union. Wachter appeals.

Here, the decisive issue is whether Wachter's claim comes within the Labor Management Relations Act—and, hence, within the exclusive jurisdiction of the National Labor Relations Board. That issue turns on whether Wachter's claim is based on an "unfair labor practice" under the Labor Management Relations Act or on an "internal union matter," to which the Labor Management Relations Act does not apply. The Union says, in effect: "Wachter claims the union interfered with his employment. That is an unfair labor practice, so jurisdiction is preempted by the federal government." Wachter retorts: "No, I'd already been fired when the union kicked me out, so my case concerns only me and my dealings with the union. Jurisdiction is in the circuit court."

Wachter's suit for wrongful expulsion deals with three earlier quasi-judicial proceedings within the Union frame-

work. First, a labor-management grievance committee upheld Wachter's dismissal from his job at C. E. S. Truck Lines. Second, Wachter filed charges against defendant Charles W. Grogan seeking to oust him from the Union for Grogan's conduct in the grievance committee hearing. The Union exonerated Grogan. Third, Grogan filed charges against Wachter to oust him from the Union for Wachter's conduct in trying to oust Grogan. These charges were sustained and Wachter was ousted. But after two appeals by Wachter, the International Teamsters Union reversed his ouster and reinstated him to membership. Then, Wachter filed this action for damages arising from his wrongful expulsion. We will relate the verdict-consistent evidence on the background, each of the three hearings, and Wachter's damages.

Wachter was a ten-year member of the Union and drove a truck for the C. E. S. Truck Lines all that time. He was active in Union affairs—his fellow workers at C. E. S. elected him shop steward. In a Union election Wachter unsuccessfully supported an opponent of defendant Grogan for the Union's presidency. Soon after, Grogan proposed a change in the Union's bylaws to empower him, rather than employees, to select shop stewards. Wachter successfully opposed this change. After this meeting where Wachter had prevailed over Grogan, Wachter heard Grogan announce that the trouble with letting employees select their own shop stewards is that "we have nothing but god-damn bums like Tony Wachter who is down at C. E. S. and it would be better to get rid of them kind of people." The next day Wachter and Grogan talked: Grogan denied making the derogatory statement and both agreed to forget it.

A few months passed and then Wachter got into trouble with his employer. This eventually led to his discharge and the hearing before the labor-management

grievance committee. From time to time Wachter's employer had warned him about violating company rules. Finally, Wachter got a warning letter from the C. E. S. president, Amos Govero, accusing Wachter of loading steel on top of a tarpaulin. During the noon hour on the next day Wachter and Govero met at the loading dock. They had an argument. Wachter demanded that Govero withdraw the warning letter, but Govero refused and ordered Wachter back to work; Wachter refused unless his business agent was present, and claimed that he was still on his lunch hour. Govero fired Wachter and sent him a confirming letter that did not comply with the company-union contract. At Wachter's request, Grogan as Union president protested the discharge and called for a hearing before a labor-management grievance committee to decide the dispute.

The Grievance Committee Hearing. The six-man committee had three representatives of management and three of labor, including defendants Grogan and Lane. After hearing evidence the committee accepted Govero's version of the dispute with Wachter and found that Wachter had wrongfully refused to go back to work. The committee unanimously upheld Wachter's discharge.

Wachter promptly wrote a critical letter to Harold Gibbons, president of the Teamsters Joint Council 13. He complained of the Union's handling of his grievance and told of Grogan's threat "to get rid of bums like Tony Wachter." He later sent a copy of the letter to Dave Beck, then president of the International Teamsters Union.

The Wachter v. Grogan Union Hearing. Wachter immediately filed charges against Grogan, urging that he be ousted from the Union. Wachter contended that Grogan had verbally abused him and that because of Grogan's

prejudice against Wachter, Grogan had accepted the employer's version of the dispute rather than Wachter's version. These charges were heard and decided by the Union's executive board, a seven-man panel. Five of the panel members are defendants here and were fellow officers of Grogan; two were Union business representatives whom Grogan had appointed.

Wachter presented evidence by Union members about Grogan's statement that the Union would have to get rid of bums like Wachter. Wachter contended that the Union should have called his fellow employees as witnesses at the grievance committee hearing to support his version of the dispute with Govero. At this hearing before the executive board Wachter did call these men —and they supported Wachter's version of the dispute. In response, Grogan presented documents showing that Wachter's discharge was proper. Also, he denied the validity of Wachter's written complaints to Harold Gibbons and Dave Beck.

The Union executive board exonerated Grogan. It did not find that Wachter's charges against Grogan were malicious. Five days later Grogan filed charges against Wachter.

The Grogan v. Wachter Union Hearing. Grogan struck back with charges to oust Wachter from the Union for Wachter's criticism of the Union and for his activities in the Wachter-Grogan ouster proceeding. Except for one substitution, the same seven-man panel of Union officers and business agents that had heard the Wachter-Grogan ouster proceeding now heard Grogan's complaint against Wachter. Grogan introduced the letters on Wachter's discharge by C. E. S., the grievance committee's finding upholding Wachter's discharge, and Wachter's letters to Gibbons and Beck. Grogan testified that Wachter could have got work and that he never came to the Union hiring

hall. By testimony and argument Wachter denied Grogan's charges. The executive board found Wachter guilty of all charges and ordered him permanently expelled from the Union. Wachter first appealed to the Teamsters Joint Council 13, which upheld his expulsion, and then to the International Teamsters Union. There, the order of Wachter's expulsion was set aside and, almost three years later, he was reinstated in the Union "with any and all rights retroactive to the date of his expulsion."

Wachter stated at the first hearing, before the labor-management grievance committee, that he was being "kangaroo'd"; however, at both hearings before the executive board Wachter said he was satisfied with the way the hearings were conducted.

At the trial of this case Wachter testified to his damages. During the five-month period between his discharge from C. E. S. and his expulsion from the Union, Wachter got some work. Through what he called "the grapevine"—other union drivers and dockmen—Wachter got short-term jobs from five other truck lines, earning some $850. After his expulsion from the Union, Wachter did not go to the Union's hiring hall because of a sign there on the window, "For Members Only of Local 600." Although some non-Union members did get work through the hiring hall, Union members were sent out first—non-Union members got what was left over, if anything. Union membership is not essential to getting a job as a driver, but most truck terminals are unionized and membership is helpful. Wachter looked for work. He kept making job applications but got only four weeks' work from two truck lines, earning about $270.

Wachter owned a part interest in a tavern with his father-in-law, and during his 34-month expulsion Wachter worked at the tavern. When his Union membership was

restored he went back to work as a truck driver. His net loss of earnings during his expulsion was over $6,000. Wachter's wife testified that after his expulsion he tried to get work and that "he just worried and didn't take no interest in anything."

Wachter submitted his case to the jury by modifying MAI 23.07. By this, the trial court told the jury to find for Wachter if:

> "First: Defendants instigated a proceeding before the Executive Board of Local Union No. 600 of the Teamsters and caused plaintiff to be expelled from Local Union No. 600 of the Teamsters from February 15, 1956, to June 30, 1958, and
>
> "Second: Said proceedings terminated in favor of plaintiff, and
>
> "Third: In doing so, defendants acted maliciously and without reasonable grounds, and
>
> "Fourth: Plaintiff was thereby damaged."

The term "maliciously" was defined by MAI 16.01; Wachter's actual damages were submitted by MAI 4.01. As said, the jury set Wachter's actual damages at $12,700. Judgment was entered for Wachter, but on the Union's after-trial motion for judgment this was set aside. The trial court then entered judgment for the Union on the ground that the court had "no jurisdiction over the subject matter of plaintiff's petition because the exclusive jurisdiction of such matters is vested by Federal law in the National Labor Relations Board." On this appeal Wachter's only point is that his claim is based on an "internal union matter" outside the scope of the Labor Management Relations Act and, therefore, the trial court erred in disclaiming jurisdiction. The Union defends the trial court, reasoning: (a) Wachter claims that the Union interfered with his employment, (b) such interference is

an "unfair labor practice" under the Labor Management Relations Act, and (c) exclusive jurisdiction is therefore with the National Labor Relations Board.

We deal first with Wachter's contention that his case is based on an internal union matter. Then we shall examine the Union's contention that the case is based on an unfair labor practice.

Internal Union Matter? The general scope of the Labor Management Relations Act embraces transactions between employers and labor unions and transactions between employers and unionized employees. The Act is not aimed at transactions between unions and their members.

Wachter pleaded and submitted that the Union had maliciously expelled him. He claimed that this wrongful conduct **resulted** in loss of earnings and mental anguish. In contending that the basis of his case is an internal union matter, Wachter relies principally on the case of International Assn. of Machinists v. Gonzales, 356 U. S. 617, 2 L. Ed. 2d 1018, 78 S. Ct. 923 (1958). In **Gonzales** the California courts had not only allowed plaintiff damages for inability to find work, mental pain and suffering, and punitive damages, but had also ordered his reinstatement to union membership. In affirming this, the U. S. Supreme Court pointed out that membership in a labor union constitutes a contract between the member and the union, and that state law affords a remedy in damages when the contract is breached by wrongful expulsion. The Supreme Court upheld state jurisdiction, saying:

> "* * * But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to

> §8 (b) (1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . .' [Citation] The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein.' "

Gonzales does not stand alone. Other cases also hold that the doctrine of federal preemption does not attach to actions for damages resulting from loss of union membership. See International Union, United Automobile Workers v. Hinz, 218 F. 2d 664; Bussey v. Plumbers Local 3, 286 F. 2d 165 (C. A. 10, 1961); Burns v. Carpenters Local 626, 204 F. Supp. 599 (U. S. D. C. Del., 1962).

Wachter also relies on Sipes v. Vaca, Mo. (banc), 397 S. W. 2d 658, Cert. granted, 16 L. Ed. 2d 680 (1966). There, the plaintiff was discharged from his job and protested his discharge. The defendant union refused to process his protest to the union's national arbitrator unless plaintiff paid defendant $300. Plaintiff refused, sued the defendant union, and got a $10,300 judgment. On appeal the defendant union, as here, contended that it was being charged with interference with the plaintiff's employment and, therefore, an unfair labor practice was at issue; hence, exclusive jurisdiction was in the federal government. In denying federal jurisdiction the Missouri Supreme Court relied on **Gonzales**, saying:

> "* * * the real complaint of Gonzales was his inability to obtain employment **because** of his expulsion from union membership. We see no difference in that situation and the situation in the instant case. We are dealing with an **internal union matter** in that [plaintiff] complained of the refusal of the union to

fully process his grievance. He, like Gonzales, hoped that as a result of proper union action he would be restored to his employment. If Gonzales involved a purely internal union matter then the case at bar involves a purely internal union matter. The Gonzales case is clearly applicable here and is ample authority for our conclusion that jurisdiction of the subject matter of this case has not been pre-empted by the Labor Management Relations Act, 29 U. S. C. A., § 141, et seq." (Our emphasis).

Here, the issue was even more an internal union matter than in the Sipes case. There, the plaintiff was trying to compel his employer to rehire him. He claimed that his union had maliciously failed to protect his right to that continued employment. Here, Wachter was out of work when the Union wrongfully expelled him. Loss of employment elsewhere was the result of the Union's wrongful conduct and entered the case merely as one of the elements of Wachter's damages. We hold that Wachter's cause of action concerned an internal union matter.

In reaching this conclusion we have examined the Union's criticism of the Gonzales and Sipes cases. The Union points out that in **Gonzales** the focus of plaintiff's action was on reinstatement to union membership, not on damages. That does not lessen the force of **Gonzales**, where the state court granted both restoration and damages for expulsion. If a state court has jurisdiction to do both, it has jurisdiction to do either. The Union also tries to distinguish the Missouri Supreme Court's holding in the Sipes case. The Union says the plaintiff there "was not complaining of discrimination with regard to his employment opportunities." Neither is Wachter. Just as in the Sipes case, plaintiff Wachter complains that the Union breached an internal union duty and that the breach **caused** his damage by loss of employment. The

Union's criticism of the Gonzales and Sipes cases is unsound. Both cases apply here.

Unfair Labor Practice? The Union relies on the cases of Plumbers Local 100 v. Borden, 373 U. S. 690, and Iron Workers Local 207 v. Perko, 373 U. S. 701. In each case the union activity was held to be an unfair labor practice, and the doctrine of federal preemption was applied. In the Borden case the plaintiff held union membership but the union refused to refer him for employment. In the Perko case the union caused the plaintiff to be fired. In each case federal preemption applied because the case focused directly on the defendant union's activities in interfering with the plaintiff's employment, rather than on the plaintiff's union membership as here and in **Gonzales**. In Sipes v. Vaca, supra, at l. c. 663-664, the Borden and Perko cases were distinguished and held inapplicable. We reach the same conclusion.

To support its theory of federal preemption, the Union quotes the Missouri Supreme Court's statement in Cook v. Brotherhood of Sleeping Car Porters, Mo., 309 S. W. 2d 579, l. c. 586: "It is apparent that Congress has left only a minimum of responsibility (and jurisdiction) to the courts, State or Federal, in the field of railway labor relations." Also, the Union insists that this case is "arguably" within the scope of the Labor Management Relations Act and that is enough to divest state courts of jurisdiction. The word "arguably" was used to construe the Act in San Diego Unions v. Garmon, 359 U. S. 236, l. c. 245. That case was one for damages for picketing brought by an employer against a union, "a tort based on an unfair labor practice," wholly unlike the case before us. The word "arguably" was used by the Supreme Court to apply the "Delphic nature" of the jurisdictional limitations of the Act. In contrast to this "arguably" contention, the same decision said at l. c. 243 that there

was no preemption where the questioned activity was "a merely peripheral concern of the Labor Management Relations Act." These cases, and others cited by the Union, contain abstract statements that give superficial support to its contention of preemption. But not one is remotely similar to the case before us, where the issue is one of damages arising from wrongful expulsion from a union. **Gonzales** was just that kind of case.

The assertion of an unfair labor practice was advanced by the defendant union in **Gonzales**. At l. c. 619-620, the Supreme Court conceded that in such a suit there might be "embedded circumstances that would constitute an unfair labor practice," and that by "wooden logic" it might be said that expelling a member from a union might cause an employer to discriminate against an employee. But the Court cast aside that argument, saying: "But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied."

We hold that our case is based on an internal union matter, not on an unfair labor practice. It is therefore outside the doctrine of federal preemption, and the trial court did have jurisdiction. This requires a reversal of the trial court's order setting aside Wachter's verdict and judgment. It does not fully dispose of the appeal.

As mentioned, the trial court denied the Union's motion for a new trial. In the respondents' brief the Union now raises two points. Although the Union did not appeal (naturally!), points raised below in the Union's motion for new trial and properly briefed here are reviewable. In Hughes v. St. Louis Nat'l League Baseball Club, 359 Mo. 993 (banc), 224 S. W. 2d 989 [4, 5], the court said: "* * * when, as here, the motion to set aside is sustained

and the motion for new trial overruled * * * and the plaintiff appeals from the judgment entered against him, then the defendant may in his brief allege error in instructions or other procedural matters raised in his motion for new trial."

In the first of these "Points Relied On" the Union says: "Plaintiff failed to prove the essential elements of his cause of action which was in the nature of an action for malicious prosecution. * * * Plaintiff has failed to prove the essential elements of his cause of action." The Union's first point must fail, for two reasons. It is a mere abstract assertion: it does not state **what** essential elements were not proved. Such a sweeping challenge to the sufficiency of a plaintiff's evidence does not comply with Civil Rule 83.05 (e), V. A. M. R., and presents nothing for review. See Jones v. Farm Bureau Mutual Ins. Co., Mo. App., 284 S. W. 2d 11 [3] (where the point raised said: "The plaintiff failed to prove facts upon which relief could be granted"), and State ex rel. P. W. Finger Roofing Co. v. Koch, Mo. App., 272 S. W. 2d 22 [3] (where appellant charged only that: "The verdict * * * is not supported by the evidence * * *"). Next, even if we consider the words "in the nature of an action for malicious prosecution" as a specific point of error, we are confronted with a point raised for the first time on appeal. In the argument section of the brief the Union lays out the elements of an action for malicious prosecution and then argues in detail that Wachter's evidence did not prove all those elements. Wachter did not contend below and does not contend here that his action is one for malicious prosecution. Instead, plaintiff's claim is based on the theory that he was maliciously expelled from membership in the Union. The Union's after-trial motion did not give the trial court an opportunity to rule on whether Wachter had to or did prove each element of a case of malicious prosecution. The motion complained

of Wachter's verdict-directing instruction only in general terms, saying: "* * * it misinformed the Jury as to what facts will suffice under the law for a verdict * * *." The malicious prosecution theory was not mentioned. Being raised here for the first time, the point is not preserved for review. "We are precluded from considering any allegations of error which have not been presented to or decided by the trial court." Georg v. Koenig, Mo., 370 S. W. 2d 356 [3, 4].

We have not overlooked the fact that Wachter submitted his case by modifying MAI 23.07, an instruction designed to submit a malicious prosecution case. By doing so, Wachter took on a heavier burden than needed to make a case for wrongful expulsion from the Union. (As to elements of recovery for wrongful expulsion, see Mullen v. Seegers, 220 Mo. App. 847, 294 S. W. 745 [2, 3]; Junkins v. Communication Workers Local Union 6313, 241 Mo. App. 1029, 271 S. W. 2d 71 [15, 17]; Hall v. Morrin, Mo. App., 293 S. W. 435 [7]; 21 ALR 2d 1397, § 11; 74 ALR 2d 783, § 2.) This instruction was harmless to the Union. However, our ruling is based on the ground that the Union's point presents nothing for review.

In the second of these "Points Relied On" the Union briefs a point on the admission of evidence. At the trial the court admitted the Union's records of the proceedings against Wachter and, also, the transcripts of the Wachter v. Grogan and the Grogan v. Wachter hearings. These were not admitted as substantive evidence of the facts testified to therein, but for the limited purpose of showing whether Wachter's expulsion was malicious. At least twelve times the Union objected to admission of the transcripts, asserting nine different grounds. The Union's brief, without making page references to the transcript, now argues three of these grounds: (a) that two of the hearing witnesses were present at the trial, (b) that the Union was denied the right to cross-examine the wit-

nesses, and (c) that, generally, the transcripts were hearsay.

Civil Rule 83.05 (e), V. A. M. S., says: "The points relied on shall briefly and concisely state what actions or rulings of the Court are claimed to be erroneous and briefly and concisely state why it is contended the Court was wrong in any action or ruling sought to be reviewed * * *." In its "Points Relied On," the Union says: "The Trial Court erred in admitting into evidence and allowing to be read to the jury the transcripts of proceedings before the union's executive board involving intra-union charges." The point ignores the rule. As said, the Union made and the trial court ruled on a dozen objections asserting nine different grounds. The Union's brief informs neither Wachter's counsel nor this court **what** rulings were wrong or **why** the trial court erred. Having failed to comply with the rule, the Union has preserved nothing for review.

The judgment for the defendant Union is reversed and the cause is remanded for reinstatement of the verdict and original judgment for plaintiff Wachter.

James D. Clemens,
James D. Clemens, Commissioner.

Per Curiam:

The foregoing opinion of Clemens, C., is adopted as the opinion of this court. Accordingly, the judgment for the defendant Union is reversed and the cause is remanded for reinstatement of the verdict and original judgment for plaintiff Anthony J. Wachter.

John J. Wolfe, Presiding Judge, Concurs.

Lyon Anderson, Judge, Concurs.

E. M. Ruddy, Judge, Concurs.

APPENDIX B.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, *et seq.*), are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Sec. 8 (a) It shall be an unfair labor practice for an employer—

* * * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: **Provided**, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in sec-

tion 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: **Provided further,** That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * * * *

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: **Provided,** That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.